IN THE

Supreme Court of the United States

_____TERM, 1916.

No. 264.

G. F. VARNER AND W. E. MARSHALL, PARTNERS, DOING BUSINESS AS THE WICHITA LUMBER COMPANY, *Appellants,*

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN, *Appellees.*

No. 265.

THE HAINES TILE & MANTLE COMPANY, *Appellant,*

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN, *Appellees.*

No. 266.

THE JACKSON-WALKER COAL & MATERIAL COMPANY, *Appellant,*

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN, *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF APPELLEES.

KOS HARRIS,
V. HARRIS,
R. L. HOLMES,
C. G. YANKEY,
W. E. HOLMES,
Of Counsel for Appellees.

SAMUEL C. EASTMAN,
Attorney for Appellees.

CRANE & CO., TOPEKA

SUBJECT INDEX.

CASES CITED.

KANSAS CASES CONCERNING MECHANIC'S LIEN STATUTES.

CASES FROM OTHER STATES.

session to go on the land and work, not one who has no title, nor right of title, nor possession to the land. No one claims that Conklin or Kimball knew that anyone was doing any work on January 3rd or 4th.

See *Lang v. Adams*, 71 Kansas, 311, lower third of page, and page 312.

Appellants, to obtain any benefit from any Kansas case, must show title, either legal or equitable, and right of possession, and a lien originating after such work has been commenced.

In the case of *Russell v. Grant*, 43 Am. St. Rep. 563 (Mo.), it is said:

> "A purchase money mortgage may not be postponed to a mechanic's lien for material furnished, when the deed and mortgage were made and delivered at the same time."

To the same effect, see:

1st Jones on Mortgages, Section 158.
United States v. New Orleans, 12 Wallace, 362.
Lumber Company v. Schweiter, 45 Kansas, 207.
Getto v. Friend, 46 Kansas, 24.
Missouri Valley v. Reed, 45 Pac. 722.

Every Kansas case cited by appellants to sustain their contention goes off on the following propositions:

A.

That a purchaser was in possession peaceably, with the consent and knowldge of the vendor.

In the case of *White v. Kincade*, 95 Kansas, 469, after stating that a vendor who induces a purchaser to expend labor and material, cannot defeat claims, the court says:

> "A different rule would apply if there was no consent or authority for the improvement to be made by the vendor, or owner of the property."

See—

Monroe v. West, 29 Am. Dec. 524.
Galbraith v. Davidson, 99 Am. Dec. 233.

This is the rule in the case at bar.

B.

That the lien attempted to be enforced was confessedly subsequent in origin to the point of time of the commencement of the building, as in the case of *Nixon v. Lodge*, 56 Kansas, 304.

The entire argument of the appellants is based on the commencement on the 3rd day of January, 1911, as the origin of Bron's title and the commencement of the work. Appellees assert that the decision of the three tribunals, the Referee, the District Court, and the Circuit Court of Appeals, all unite in the fact that the deed and mortgages were all delivered at the same instant of time, and were a part and parcel of one transaction.

In the case of *Mortgage Co. v. Winters*, 94 Kansas, 619, 620, it is said:

> "The delivery of the deed by Winters, before he had title, would have bound him by an equitable estoppel, but by this principle Leban could only get from Winters what Winters, himself, had obtained, and never, for a single instant, had the title stood in subjection to the mortgage. The mortgage was one for purchase money essentially. One who executes a purchase money mortgage is not regarded as obtaining the title and then placing an encumbrance thereon. He is deemed to take the title charged with the encumbrance, which ha. priority even over pre-existing claims, and a mortgage given to a third party to obtain money used in buying property is entitled to the same preference."

The priority of a purchase money mortgage to other liens, created before the execution, rests upon the doctrine that the deed from the vendor and mortgagee are parts and parcels of a single transaction; and germane to this idea we cite the cases under the head of purchase money mortgages, as follows:

PURCHASE MONEY MORTGAGE.

In the case of *Boies v. Benham*, 14 L. R. A. 55, and the cases cited in the notes, it is said:

> "A purchase money mortgage is held superior to another mortgage executed by the vendee."

In the case of *Anglo v. Campbell*, District of Columbia, Court of Appeals, 43 L. R. A. 622, a duly recorded mortgage for money advanced on a building was held to be prior to mechanic's lien holders and that no trust was imposed on the funds in favor of such mechanic's lien holder.

The case of *Turk v. Funk*, 68 Mo. 18, holds a mortgage for purchase money is prior to a mortgage given by the mortgagor to procure money for a cash payment, which last mortgage was executed before the title passed to the mortgagor.

And as bearing out the same point, see

Kaeiser v. Lembeck, 55 Iowa, 240.
Brower v. Witmeyer, 121 Ind. 83.
Laidley v. Aiken, 80 Iowa, 112.
Demeter v. Wilcox, 115 Mo. 422.
Stewart v. Smith, 1 Am. St. Rep. 651 (Minn.).
Wimberly v. Mayberry, 14 L. R. A. 305 (Ala.).

This last case cites the Alabama statute, which gives a lien upon improvements prior to the mortgage. Attention is called to the dissenting opinion at page 313.

However, this Alabama statute does not go as far as the District Court went in the case at bar without any statute.

The notes to this last case cite many cases to the following proposition:

A. A mechanic's lien is inferior to a prior mortgage. (Page 305.)
B. A statute that attempts to displace a prior mortgage in favor of mechanic's liens is void. (Pages 305-306.)
There are statutes referred to as giving a lien on buildings prior to mortgages, and the court below adopted a rule as though there was a statute.
C. Purchase money mortgages are prior to mechanic's liens, though the work is done before the mortgage is recorded. (Page 307.)

In the case of *Payne v. Wilson*, 74 N. Y. 348, it was held:

> "An agreement to make a mortgage, which was defectively executed, and subsequently cured and re-

corded, but not until a mechanic's lien was filed, was an equitable lien prior to the mechanic's lien."

In the same case it is held:

"The principles which give a mortgage a lien prior to a judgment creditor apply to a mechanic's lien holder."

See notes to 39 L. R. A. 84, as to the rights of the mortgagee and ownership, in connection with the Allis-Chalmers case.

In the case of *Miller v. Stoddard*, 16 L. R. A. 288 (Minn.), it is held:

"Unless there be an equitable estoppel, a mortgage is ahead of a mechanic's lien."

There is little difference, if any, between the Kansas and Minnesota statute as to mechanic's liens.

In the case of *Smith v. Wilkins*, 64 Pac. 760, a mortgage substantially in the condition of the appellees' mortgages was held prior to a mechanic's lien, citing the case of *Missouri Valley v. Reed*, 45 Pac. 722.

In the case of *Shearer v. Cummings*, 16 S. W. 37 (Texas), it was held:

"The commencement of a building without consent of the land owner does not entitle a mechanic's lien holder to a lien."

In the case of *Henry v. Coatswark*, 79 N. W. 616, it is held:

"A mechanic's lien is inferior to a mortgage, where the money was loaned to improve the land,"

and the same rule is adopted in *Chaffee v. Chested* (Nebr.), 96 N. W. 161.

In the case of *Rockford v. Rockford* (Mass.), 74 N. E. 299, it is held:

"Where a purchaser makes a contract before acquiring title, the rights of the mechanic's lien holder will be inferior to the purchase money mortgage."

The case of *Pickens v. Plattsmouth*, 59 N. W. 947 (Nebr.), holds:

> "A vendor of land is not postponed to a mechanic's lien, unless the lien holder had a contract with the vendor, or someone thereunto duly authorized, to act for him."

In the case of *Johnson v. Spencer*, 96 N. E. 104 (Nebr.), it was held:

> "An interloper cannot create a lien on land against the real owner of the property."

See also *McGuire v. Federal Mortgage Co.*, 141 S. W. 467.

In the case of *Marin v. Knox* (Minn.), 136 N. W. 15, it is held:

> "Deeds and mortgages executed on the same day are as one transaction, and thereby are ahead of a judgment lien against the vendee, and the same rule applies to a mechanic's lien."

In this last case there was a deed; a mortgage was executed to the vendor, and a mortgage was aso executed to a third party, which by agreement was to go ahead of the mortgage of the vendor.

In the case of *Strong v. Vandeusen*, 23 N. J. Eq. 369, it was held that a purchase money mortgage had a preference over a lien for work and materials put on the property by a contract with the purchaser before the execution of the contract of purchase and the conveyance.

In the case of *Hoagland v. Lowe*, 58 N. W. 197 (Nebr.), it was held:

> "The fact that the vendor agreed that the purchase price mortgage should be subordinate to one given by the purchaser to obtain money with which to erect a building, did not render it subordinate to a mechanic's lien."

In the case of *Gibbs v. Grand*, 29 N. J. Eq. 419, it was held:

> "A purchase money mortgage, subsequently executed by a vendee after acquiring title, when at the

time he did not have any consent from the owner to erect a building, was paramount to a mechanic's lien."

The case of *Reis v. Ludington*, 13 Wisc. 276, holds:

"A mechanic's lien, which by statute is prior to any lien originating subsequent to the commencement of the building, is not prior to a mortgage executed before and not recorded until after the construction is commenced."

See *Butler v. Bank*, 94 Wisc. 351.

In the case of *Johnson v. Rawles*, 58 N. W. 132, it was held:

"A mechanic's lien cannot be established by one who contracted with the vendee before the vendee acquired title and who obtained possession without right from the vendor."

To the same point, see *Pinkerton v. Lebau*, 54 N. W. 97, S. D.

The case of *Holmes v. Hutchinson*, 57 N. W. 514 (Nebr.), holds:

"The vendor's knowledge of the intention of the vendee to make improvements on the property does not postpone a purchase money mortgage to a mechanic's lien for improvements."

In the case of *Fletcher v. Kelly* (Iowa), 21 L. R. A. 347, it is held:

"A mechanic's lien holder is not a purchaser within the meaning of the statute, which requires mortgages to be recorded in order to be valid against the purchaser for value."

In 34 Cent. Dig. under head of Mechanic's Liens, column 2088, Section 5, the following text is sustained by authorities from ten different states:

"A statute which creates a mechanic's lien, being in derogation of the common law, must be strictly construed, and a strict compliance with the statutory requirements must be shown to establish a lien."

was that both mortgages were to be executed on the day of the delivery of the deed, and that they were actually executed on the day of the delivery of the deed. If it could be said that there is such inconsistency in the finding of the Referee that it cannot be accepted, then the weight of the testimony shows that the delivery of the deed and mortgages occurred at the same time.

The bankrupt Bron testified that the deed was delivered January 3rd (Transcript, 45) and the mortgages were executed January 4th. (Transcript, 47.) He also stated that the contract was that the mortgages were to be executed when the deed was delivered. (Transcript, 48.)

P. J. Conklin, who made the deal with Bron, testified that the contract was that the deed and mortgages were to be executed at the same time (Transcript, 78), and he testified that the deed was not delivered until January 4th, when the mortgages were executed. (Transcript, 78.)

There is, then, this direct conflict in the testimony. It is appellees' contention that it would be out of the ordinary for the terms of the contract not to be carried out; that it would be unusual that a man should give up his deed before he received back his purchase money mortgage, especially when the entire purchase price was to be represented by a purchase money mortgage. Bron suggests no reason why he received this deed before he was required to execute the mortgage. He merely says the deed was delivered January 3rd. Certainly the probabilities are in favor of Conklin's testimony, and the ordinary conduct of individuals in a situation of this kind would also substantiate his statement.

The Circuit Court of Appeals accepted the view of the appellees as herein stated, that is, that the Referee found that the deed and mortgages were executed and delivered on the same date, and that that date was January 4th. The Court of Appeals saw that the Referee had probably made a clerical error in the date, and in its opinion corrected this date. The appellants severely criticise the Court of Appeals for this. However, to substantiate this criticism they rely on excerpts and selected sentences from the findings of the Referee and from the opinion of the District Court. A line or two more of the Referee's certificate and the District Court's opinion taken from the same place from which these quotations are made, would have disclosed the fallacy and unfairness of their criticism.

The Referee found that the bankrupt, before the delivery or execution of the deed and mortgages, fraudulently started the work on the building, that is, by doing an hour or two's work on the excavation of the foundation. It was fraudulently done because it was in violation of the understanding of the parties and without the knowledge of the grantor in the deed. On the strength of this commencement of the building, it is contended that the materialmen's liens are superior to the mortgages because they preceded the execution of the mortgages. The fallacy of this position lies in its attempt to fasten liens upon that part of the title which the bankrupt never had or never would have had except by paying off the mortgages. The negotiations in the deal, or the preliminary contract, which was oral, provided that Bron was to have a conveyance of this title; that he was to put a first mortgage of $7500.00 upon the property, presumably to furnish a building fund, and then he was to give a second mortgage to Conklin of $4500.00, which was to be a purchase money mortgage, and that the deed and mortgages were all to be executed and delivered at the same time.

Bron's testimony as to the contract was as follows:

> "Q. You gave the mortgage back for the purchase money at the time you gave the deed? A. I gave him a mortgage back for the lots at the time he gave the deed.
>
> Q. That was the understanding? A. That was the understanding, that I should give him a mortgage back for the purchase money.
>
> Q. At the time you gave him the deed? A. No; he didn't say anything about the time.
>
> Q. How much of a mortgage did he say you would agree to be ahead of it? A. $7500.
>
> Q. That was the amount he was to have ahead of his mortgage? A. Yes.
>
> Q. You was to give him a mortgage for the purchase money when he gave you a deed, subject to the $7500? A. Yes.
>
> Q. That was the contract? A. Yes, sir." (Transcript, 48.)

Conklin's testimony as to the contract was as follows:

> "A. I was to take a second mortgage back on the

property. I was to get $4500 for the property if it was paid within a year. Then I was to accept in payment a second mortgage subject to a mortgage of $7500; and when the conversation came up I told Mr. Bron that when that deal was made we would have to have out (our) mortgage that he was to give back for the purchase price, we would have to have that as a first—a prior—before any work commenced, that no work should be done on that flats at all, nothing should be done until out (our) mortgages was of record.

Q. State whether or not you were to have a lien second to $7500. A. Yes, sir.

Q. Was that the—was any change in the terms of that agreement after that before the deal was closed? A. No, sir." (Transcript, 78.)

From this it must be evident that after the deal was finally consummated the interest or title which Bron would have in this property would be the title over and above the two mortgages which were to be executed as part of the transaction. He certainly could not get the legal title without executing the purchase money mortgage, and it is not reasonable that Conklin would take a purchase money mortgage for the entire price of the property unless Bron could borrow the money and make the first mortgage to improve it.

The result of appellants' contention in this matter would be that Bron, by not obtaining any legal title at all, or by failure to consummate the deal as agreed upon, obtains a greater right or interest than he would have had if he had carried out the deal as he agreed. The statement of the proposition shows its fallacy.

Under circumstances similar to these in this case, that is, where work is commenced without a legal title, the courts have sometimes held that a lien can attach to the equitable title of the one making improvements. Just what is meant by the equitable title is not always clear, but presumably it is that title or interest which might be the basis for an action for specific performance, or that element of the title based upon possession with the right to build either by express or implied contract which the builder would have if he carried out his contract with the owner of the legal title. Under no circumstances could mechanic's liens or material-

men's liens attach to any greater interest or estate than the person had who was doing the building. There is no reason why the building of the improvements should enlarge his estate. The courts have without exception held that liens cannot attach to any greater interest than the builder, or the owner of the title making the improvements, owns.

In this case after the deal was consummated liens could attach only to the estate which Bron had, which would be that part of the title over and above the mortgages. Before the deal was consummated, if it could be said that Bron had sufficient title to start building so that liens could attach, they could attach only to the title which he then had or would have if he carried out the contract. If he had any equitable title it would only be that title which a court of equity would give to him by his complying with all of the requirements of the contract. Bron could only lay claim to the title over and above the mortgages before the deal was consummated, and therefore mechanic's liens which were the result of his building could only attach to the same interest, be it before the deal was consummated or after.

The rule of law controlling in a situation of the kind in question is stated in the opinion of the case of *Sietz v. U. P. Ry. Co.*, 16 Kans. 133, at page 141, as follows:

> "In the present case Mrs. Bickerdyke had a contingent equitable estate in the property in question. The plaintiff had all the rest of the estate. Upon this contingent equitable estate of Mrs. Bickerdyke the defendants' liens operated, and upon that they were the paramount lien to the extent above mentioned; but they operated upon nothing more. They could not operate upon anything more. They could not reach something that Mrs. Bickerdyke did not have. They could not reach to the plaintiff's legal estate itself. A stream cannot rise higher than its fountain. And therefore, we think that said liens did not in any manner affect the legal estate of the plaintiff, or its rights thereunder."

The facts of the instant case have virtually been passed upon by the Supreme Court of the State of Kansas in the case of *Getto v. Friend*, 46 Kansas, 24. In that case one Getto owned a lot. He sold this lot to one Peavey for the

sum of $1150.00, Peavey paying $50.00 down, and agreed to give his note and mortgage for the balance as a purchase money mortgage. It was agreed between Getto and Peavey that the latter should build a house on the lot; that Getto should permit Peavey to obtain a loan on the lot and give a first mortgage as security therefor, and that Getto's mortgage for the purchase money should be subject to the mortgage given by Peavey to obtain the money with which to build the house. Peavey obtained a loan for $1150.00, which was in one mortgage for $1000.00 made to Strong and assigned to Melrose, and a mortgage for $150.00 made to Strong and assigned to Rogers. Getto made a deed and delivered it to Strong. Peavey executed the two mortgages, the one to Getto reciting that it was subject o the mortgages of Strong in the amount of $1150.00. All papers were recorded on the 4th of June. The contract for the sale of the lot under the terms as stated was made the 1st day of May. Work was commenced on the building on the 17th day of May, before the delivery and execution of the deed and mortgages. It was held by the lower court that the purchase money mortgage to Getto was a first lien, that the mechanic's liens were second, and that the mortgages to Strong and assigned to Melrose and Rogers were a third lien, but were subrogated to the rights of Getto, and that thereby the debts to Getto secured by the purchase money mortgage was the last lien upon the premises. The Supreme Court decided, at pages 29 and 30 of the opinion, as to the priority of all the liens as follows:

> "While there was no express stipulation between Getto and Peavey in this case to that effect, the agreement was that Peavey should execute a mortgage to secure the building fund, which by the consent of Getto should be a first and superior lien to that of Getto for the balance of his purchase-money. By all the ordinary rules of law, those furnishing material to and doing work for Peavey were bound to ascertain the nature and extent of his equity in the lot. To the extent of that equity, whatever it may be, the materials furnished and the work performed are a lien dating from the commencement of the building and prior to all subsequent liens or incumbrances, but, in the language of Mr. Justice VALENTINE, in the case of *Seitz v. U. P. Rly. Co.*, 16 Kas. 133: 'A lien upon an estate cannot be greater than the estate itself. A stream

cannot rise higher than its fountain.' It seems, therefore, that the operation of the mechanics' liens must be limited to the equity of Peavey in the lot, and that the trial court erred in determining the priority of liens; the true order being, so far as the legal estate is concerned: First, the mortgage to Melrose; second, the mortgage to Rogers; third, the mortgage to Getto; fourth, the mechanics' liens; and upon the equitable estate of Peavey: First, the mechanics' liens, and the mortgages following them in the order above stated."

The Supreme Court of the State of Kansas in the case of *Lumber Company v. Schweiter*, 45 Kans. 207, has also passed upon a situation similar to the one in the instant case. In that case Schweiter, the owner of a lot, sold the lot to one Jones, taking back a purchase money mortgage which was to be subject to a first mortgage which was to provide a building fund for the erection of a house upon the lot. The commencement of the building was long before the deed and mortgages were executed. In the opinion, at page 211, the court said:

"The lumber company, therefore, can claim only through the contract under which Jones held, and must take subject to the restrictions and limitations therein imposed on Jones. The contract stipulated that the $1,200 mortgage should be the first lien on the lots when they were conveyed to Jones, and the one given to Schweiter for the purchase-money should be a second, and an examination of the contract would have warned the lumber company that it must look to the proceeds of the first mortgage, which was doubtless provided as a fund for the erection of the building, or else it must make a contract with Schweiter, who was both the legal and equitable owner. Whatever equities Jones had in the property under his contract were subject and subordinate to the interest of the owner, as the contract provided; and as the lien can in no event cover more than the qualified interest that Jones had, it follows that such lien is subject and subordinate to the liens and mortgages expressly provided for in the contract."

In the case of *Lumber Company v. Arnold*, 88 Kans. 471, referred to in appellants' brief, it should be noted that the

mechanic's liens attached only to the equitable estate and the rights of the owner of the legal title were protected and he was given a first lien.

SECOND.

UNDER THE KANSAS STATUTE, AS INTERPRETED BY THE SUPREME COURT OF KANSAS, A BUILDING IS COMMENCED WHEN WORK OR LABOR IS BEGUN ON THE EXCAVATION FOR THE FOUNDATION, IN GOOD FAITH, PROVIDED THE PERSON WHO CAUSES THE WORK TO BE DONE HAD ANY TITLE OR INTEREST IN THE LAND, AND A LIEN WOULD ATTACH ONLY TO THE INTEREST WHICH HE HAD, AND PROVIDED FURTHER, SUCH PERSON HAD THE RIGHT OF POSSESSION AND CONSENT OF THE OWNER OF THE LAND TO COMMENCE WORK.

The District Court held that the building was commenced. The Circuit Court of Appeals held that it was not a real, *bona fide* honest commencement. (Transcript, pages 148 and 149.) The said commencement was not a beginning of a building, such as to arise to the dignity of a commencement. The Referee found that the work done was done to give preference to mechanic's liens over the mortgages. (Transcript, pages 10 and 149.)

We contend that rights cannot be founded upon fraud.

The District Court (Transcript, page 128), in the same sentence in which he states the commencement of the building, announces the doctrine that any person then, after the commencement of the building, may search the records and if no mortgages or other encumbrances be found of record, he may safely rely on his rights under the law to perfect the mechanic's lien.

The District Court overlooked the fact that a search of the records on January 3rd, 1911, and until noon of January 4th, 1911, would have discovered the title in Conklin, which disclosed all of the equities and rights for which the appellees contend in this action. (Opinion of Circuit Court of Appeals, transcript, pages 148 and 151.)

The mechanic's lien law provides that a contract shall be made with the owner, who, in the case at bar, until noon of January 4th, 1911, was Conklin, not Bron.

The case of *Nixon v. Lodge*, 56 Kansas, 304, was one where a loan was made, and the evidence of the same was not completed, nor filed for record, until September 28th, 1888, and work was begun on August 31st, 1888. Therefore, this lien fell under the ban of the statute, as a lien which came into existence and originated subsequent to the commencement of the building.

The General Statutes of Kansas, 1909, Section 6244, quoted in the transcript at pages 127 and 146, say: "Any person, who shall under contract with the owner, trustee, agent, husband or wife."

The lien in the case at bar sprang into existence at the instance of the delivery of the deed, notes and mortgages. (Transcript, page 126.))

The case of *Thomas v. Mower*, 27 Kansas, 265, has no application to the case at bar. This case is as follows:

> "The owner commenced work on the cellar; about the time the cellar was completed, he purchased lumber to build a house, which was built over the cellar. Subsequently, the lumber dealer filed a mechanic's lien on the property. Between the time of the digging of the cellar and the furnishing of the lumber, a mortgage was placed on the property. The mortgage was executed between the 1st and 15th days of May, 1880, and the cellar was about completed at the time of the execution of the mortgage. *Held*, that the mechanic's lien was prior to the mortgage."

In appellant's brief, at page 15, it is stated that at an early hour on January 3rd, 1911, Bron entered upon the premises with laborers and did an hour or two's work.

The facts were that on January 3rd, 1911, with zero weather (transcript, pages 29 and 33), an hour's work was done on frozen clods, in fraud, to get ahead of the mortgages. See Underwood's testimony, transcript, page 55: "I just went up there, and it was so cold I couldn't stand it, and I think I hauled out two loads and went home on January 3rd, 1911."

The Kansas mechanic's lien statute provides that the contract shall be made with the owner, that is, an owner with legal or equitable title, who has a lawful right of pos-

SEISIN OF THE GRANTEE.

The seisin of the grantee will not support a mechanic's lien, where the grantee executes a mortgage back to the grantor or a third party, and when such deeds and mortgage all appear to have been executed on the same date and recorded at the same time, they are as one transaction.

Clark v. Brickley, 32 N. J. Eq. 664 (Ballard), 474.
Russell v. Grant, 26 S. W. 958.
Moody v. Tashbold, 53 N. E. 1053.
Oliver v. Doney, 34 Minn. 292.
Reis v. Ludington, 13 Wisc. 275, 14 L. R. A. 305, 64 Am. St. Rep. 275.

In the case at bar, the District Court went beyond the Arnold case, above cited, and made a new rule, which, in the opinion of counsel for appellees, the Kansas statute does not authorize. There are cases that hold possession delivered to the vendee vests an equitable title, but possession without consent or knowledge of the vendor or mortgagee, is not the possession contemplated by law.

Title Co. v. Wrenn, 76 Am. St. Rep. 454.
Davidson v. Jennings, 83 Am. St. Rep. 49.
Saunders v. Bennett, 39 Am. St. Rep. 456.
Stevens v. Lincoln, 114 Mass. 476.
McGuire v. Guthrie, 6 Abbott N. S. N. Y. 58.
Courtmanche v. Blackstone, 64 Am. St. Rep. 275.

To the point that a person who furnishes either labor or material is bound to take notice of the title and the extent of the title of the owner, and if he be an intruder without right there can be no lien, see the following cases:

Taylor v. Murphy, 33 Am. St. Rep. 825 (Pa.).
Morrison v. Clark (Utah), 77 Am. St. Rep. 924.
Johnson v. Spencer, 96 N. E. 104 (Ind.).

THIRD.

THE APPELLANTS' THIRD PROPOSITION IS THAT THE BANKRUPT DID WORK ON JANUARY 3RD AND 4TH, WITH A MOTIVE OR INTENT OF PREFERRING THE MECHANIC'S LIENS, CANNOT AFFECT THE RIGHTS OF THE MECHANIC LIEN HOLDER WHO HAD NO KNOWLEDGE OF BRON'S MOTIVE.

The appellees assert that work done fraudulently, without the knowledge and consent of the owner, to defeat prior liens, cannot affect the right of the mortgagee.

Appellants, starting again in their argument with work done on the 3rd and 4th days of January, and stating that the mortgage was filed January 4th, after noon, assert some propositions. The statements are made in the face of the record that all of the instruments, deed and mortgages, were filed at the same time (Transcript, pages 12 and 13); the deed on January 4th, 1911, at 11:40 A. M.; appellee, The New Hampshire Savings Bank, mortgage on January 4th, 1911, at 12:10 M., and Conklin's mortgage on January 4th, 1911, at 12:30 M.

This date of filing demonstrates that these instruments were filed in regular chronological order, and the court will assume that they were done at the same time. They were all delivered at the same time (Transcript, pages 126 and 147), and until noon of January 4th, 1911, the title was in Conklin, and when the instruments were all recorded, all the title and equities of all the parties was published to the world, and all persons charged with notice by the record could then have ascertained the rights and equities of all the parties.

The quotation from the District Court (Transcript, page 127) uses the language, "prior to the filing of the mortgages."

This court will note that it was also prior to the filing of the deed, which was the foundation of Bron's title or equity in the land. The fraudulent intent and corrupt motive of Bron, Jr., is a criterion if the work was commenced prior to any title or vestige of title in Bron. The instruments were delivered at the same instant of time and at that moment, Bron got a title and the mortgage liens sprang into existence, and then only could Bron lawfully do any work, and, therefore, work that was done prior to that time, was in fraud of the rights of the mortgagees.

Appellees concede that if a mortgage is actually negotiated and executed after improvements are commenced, the fact that a mortgagor deceives the mortgagee does not create an equity which puts the mortgage ahead of the mechanic's liens, but that is not the case at bar.

In appellants' brief at page 20 it is said:

> "When a statute provides for a lien which shall be a preferred lien to all which shall attach subsequent

> to the commencement of the building, and another statute provides that a mortgage shall not be valid except as to the parties until the mortgage is deposited for record, makes the dates when the respective acts were done the sole criterion in determining priority."

This assumes that a mechanic's lien claimant is a purchaser for value, which is not the law.

The court will note that Conklin gave a deed to Bron; he immediately took back a mortgage from Bron, which recited that that mortgage was subject to another mortgage of $7500.00.

In our judgment, appellants' contention is opposed to the law, as written. See *Mortgage Co. v. Winters*, 94 Kansas, 619, lower third of page.

On the same page 20 of their brief, appellants argue that when a mechanic's lien claimant commences work and the mortgages were not recorded, they need not look any farther.

This is not the law. The filing of the mortgage gave notice of the claim of Bron to the title, which was the foundation of the mortgage and the record which the materialmen were charged with disclosed that the Bron deed, filed the same hour, was a part and parcel of the entire transaction, and when Bron got the title, he got the same with the mortgage encumbrances thereon, and all persons were charged with notice that Bron had no title until noon of January 4th, and what title he then got was mortgaged.

Any other rule of law would disturb all real estate titles.

The claim is made in appellants' brief, at page 21, that the situation is the same as that of an innocent holder of a note, which cannot be enforced between the parties, but which in no wise prejudices an innocent holder.

This proposition is an astonishing one, as applied to the case at bar, and shows a hazy conception of the legal questions before this court. Outside of the law of negotiable instruments, there is no such a thing in law as an innocent purchaser, unless made so by statute or unless created by estoppel, and there is no pretense of either in the case at bar.

In their brief, at page 20, counsel for appellants cite the case of *Gordon v. Tooey*, 15 N. J. Eq. 112, 82 Am. Dec. 273.

An examination of this case shows that it has no application whatsoever to the case at bar, as the owners made a deed which was a mortgage and "which effectually disposed of the objection to the lien."

At page 22 of appellants' brief it is urged that Bron had the equitable title on December 22nd, 1910, under some kind of a vague oral understanding. There is nothing in the record to sustain this contention, and if Bron had not received any deed on January 4th, at noon, and executed and delivered the mortgages, he would have been a trespasser upon the land and subject to ejectment. All that was done prior to January 4th, 1911, was null and void. Cases are cited to the effect that if a person has a lawful right to do an act, his motive will not defeat the act. This is "horn-book" law.

Appellees' contention is that Bron had no title, either legal or equitable, until the deed and the mortgages were delivered, and had no right of occupancy or possession to the land; that no one knew that he did any work, except Bron, and no one consented to his doing any work. Hence, his motive is material.

The cases cited by appellants' counsel, as to the motive, are not applicable, for the reason that they are founded on a legal right to do an act. The cases cited are bottomed on the fact that the absolute right to do the act done existed. In the case at bar, there never was any right to do any work until the instruments were delivered.

The Kansas conveyance acts, General Statutes of Kansas, 1901, Sections 1221, 1222 and 1223, are the statutes that govern the proposition as to record notice, referred to by appellants:

> SECTION 1221: "Every instrument in writing, that conveys real estate, or whereby real estate may be affected, proved or acknowledged, may be recorded in the office of the Register of Deeds."
>
> SECTION 1222: "Every such instrument in writing, certified and recorded in the manner prescribed, shall from the time of filing the same with the Register of Deeds, impart notice to all persons of the contents thereof, and subsequent purchasers and mortgagees shall be deemed to purchase with notice."

SECTION 1223: "No such instrument in writing shall be valid, except between the parties thereto and such as have actual notice thereof, until the same are deposited with the Register of Deeds."

The above statutes are similar in their terms to those of Iowa, Wisconsin and other states.

A mechanic's lien holder is not an innocent purchaser, under the above act and no other statute is applicable to the facts. See—

Fletcher v. Kelly, 21 L. R. A. 347, Iowa.
Nashua v. Edwards, 61 Am. St. Rep. 226, Iowa.
Noyes v. Crawford, 96 Am. St. Rep. 367.
Matwig v. Mann, 65 Am. St. Rep. 47, Wisc., 96 Wisc. 213.

In the case of *Lang v. Adams*, 71 Kansas, 311, bottom of page, it is said:

"A mechanic's lien holder is required to know who the owner is and name him in the lien. The statute does not say that the owner of record can create a lien, nor that a contract with some one who has an apparent title is sufficient for the lien. The provision is that the contract shall be with the owner, and this necessarily means the actual owner of the interest in the property."

Our view is that judgment creditors, attaching creditors, and mechanic's lien holders, so far as liens on the land are concerned, are the same in Kansas and are subject to all existing equities, titles and liens, whether recorded or not.

Burk v. Johnson, 33 Kansas, 337.
Dearborn v. Vaughn, 46 Kansas, 506.
Ellwell v. Hitchcock, 41 Kansas, 130.
Holden v. Garrett, 23 Kansas, 98.

The mechanic's lien is a creature of statute.

Nixon v. Lodge, 56 Kansas, 304.
Zabriskie v. Greater Am., Etc., Co., 62 Lra. 369, and notes to same.

There is no reason why a mechanic's lien holder should have any different status than a judgment or attaching creditor.

The legislature could have said "*all liens recorded after the commencement of the building*," but what it did say was "such liens shall be preferred to all other liens and encumbrances, which attach subsequently to the commencement of the building."

The liens of the appellees in this case attached upon the delivery of the deed and mortgages.

FOURTH.

APPELLANTS ASSERT THAT MECHANIC'S LIEN CLAIMANTS ARE ENTITLED TO A LIEN UPON THE IMPROVEMENTS, SEPARATE AND APART FROM THE LAND, REGARDLESS OF THE PRIORITY OF THE MORTGAGES.

This proposition is denied by the appellees. There are statutes that provide for the condition claimed by the appellants, but the Kansas statute quoted in the record (Transcript, pages 127 and 146) is not in that class.

The Kansas statute provides that "any person who shall, under contract, etc.. . . . shall have a lien upon the whole of said piece or tract of land for the amount due."

Statutes which provide for the separation of liens also provide for a method in the sale, valuation or appraisement, and a distribution of the fund arising from the value of the land and the value of the improvements.

Under the mechanic's lien law, Section 5124 of the General Statutes of Kansas, 1901, it is said:

> "In all cases where judgments may be rendered in favor of any person or persons to enforce a lien under the provisions of this act, the real estate or other property shall be ordered to be sold as in all other sales of real estate."
>
> SECTION 5127: "If the proceeds of the sale be insufficient to pay all the claimants, then the court shall order them paid in proportion to the amount due each."

If the contention of the appellants is correct, then court, without a statute, must inject into the statute some plan for the separate appraisal and valuation, and find the different values of the land and the value added by the improvements, but as a reason why this cannot be done the statute provides for a sale of the land and improvements, and if the entire proceeds be insufficient to pay all liens,

then the same shall be paid in proportion to the amounts due.

The case of *White v. Kincade*, 95 Kansas, 466, falls short of the claim made by the appellants in their brief at page 24. In this case, the court said:

> "The vendor, who induces one who has contracted to purchase to expend labor and material, cannot defeat the claim of the lien, etc."

The claim made on page 24 of appellants' brief, that many states, including Kansas, have adopted the rule of separate liens on land, is incorrect in so far as Kansas is concerned.

No one doubts that a leasehold estate is subject to a mechanic's lien, and a life estate might become subject to a mechanic's lien, but the tenant has an interest, which interest only may be subject to the lien. (*Zabriskie v. Greater Am., etc.*, 63 L. R. A. 369, and notes thereto.)

The case of *McCrie v. Lumber Company*, 7 Kans. App. 39, cited in appellants' brief, at page 25, has never been expressly overruled by the Supreme Court, but it has never been followed by any court since it was rendered, and the case is never cited as an authority in the Kansas courts. This case would be applicable in a leasehold estate, where no lien could attach to the land at all, and can only attach to improvements.

The mechanic's lien acts of 1859 and 1862 were wiped out and the present act put in place thereof.

In *Seitz v. U. P. Railroad*, 16 Kansas, 133, cited in appellants' brief at page 28, this was a case under the act of 1862, and Sections 14 and 17 cited were not re-enacted in 1868 or at any time subsequently, but in lieu thereof is the present act, as it is set forth in the record at pages 127 and 146. This change of statute was intended to change the practice, the judgment, the sale and the distribution of the proceeds.

Appellants' citation of a repealed statute of 1859 and 1862, can be of no more force in the presentation of this case than the statute of another state. The present mechanic's lien statute governs the right of all of the parties in this action.

It will be noted that in the case of *McCrie v. Lumber Co.*, 7 Kans. App. 39, above cited, the Kansas Court of Appeals assumed the function of the legislature and injected into the statute provisions that the legislature intentionally omitted, viz.: Separate sales, valuations and appraisements.

In that case, the court said: "The construction put on the statute by defendant was the same as by other courts on similar statutes," all of which was a pure assumption, as no court, under a statute like the Kansas statute, has ever made such a judgment or decree.

The words, "or either of them," as applied by the Kansas Court of Appeals, are erroneous, as that would refer to a leasehold estate, but would have no application to an estate where the land upon which the improvements were made had the title vested in the owner.

The case of *Getto v. Friend*, 46 Kansas, 24, 30, referred to in appellants' brief at page 28, is not applicable to the case at bar. It was agreed by the parties that Bron should have a deed and execute a mortgage, and this mortgage should be ahead of the Conklin mortgage, and this was all put into effect by the delivery of the deed and mortgages at the same instant of time.

And in the above case the vendee was put in the possession by Getto, and the case does not apply.

There is an assumption by appellants that Bron was in the open, notorious, peaceable possession, with vendor's knowledge and consent, which the appellees assert is contrary to the facts

FIFTH.

UNDER THE KANSAS STATUTE OF FRAUDS, THE ORAL AGREEMENT THAT THE MORTGAGES SHOULD BE EXECUTED AND DELIVERED CONCURRENTLY WITH THE EXECUTION AND DELIVERY OF THE DEED TO THE BANKRUPT AND BE A FIRST AND PRIOR LIEN ON THE PROPERTY, AND THAT THE KIMBALL MORTGAGE SHOULD BE PRIOR TO THAT OF CONKLIN, WAS VOID AS TO THE APPELLANT MECHANIC'S LIEN HOLDERS.

Appellants in their fifth proposition, above quoted, refer to the statute of frauds as having a bearing on this case. At the outset their argument depends upon the assumed fact that the deed was delivered as a conveyance of title before

In the case of *Wager v. Briscow*, 38 Mich. 587, it is said:

> "A mechanic's lien law is an innovation of the common law over the rights of property by permitting the institution of private charges on property without the owner's consent. The provisions of the mechanic's lien law cannot be extended in their operation and effect beyond the plain, ordinary and fair sense of the terms, and those who assert liens resting on mechanic's liens must bring themselves plainly and distinctly within the terms of the statute."

See also *Stevens v. Lincoln*, 144 Mass. 476.

In the case of *Ely v. Pingry*, 56 Kansas, 17, it is held:

> "A mechanic's lien cannot attach to a building for material to which the owner of the land has never consented."
>
> "The grantor of land who, at the time of the execution of the conveyance, takes back a mortgage for balances due him is not required to search the records for encumbrances by the grantee, while he is a stranger to the title and before the deed is executed."

The reasoning of this case sustains the contention of the appellees that those who have transactions with the grantee are bound by the equities between the parties.

In the above case, at page 306, it is said:

> "Ely did not part with his money on the faith of the record and he does not occupy the position nor is he entitled to the protection of a *bona fide* purchaser or holder."

Our contention is that anything done prior to the instant delivery of the deed in the case at bar to Bron could not prejudice either the rights of The New Hampshire Savings Bank or P. J. Conklin.

See—

Missouri Valley v. Reed, 45 Pac. 722.
Saunders v. Bennett, 39 Am. St. Rep. 456 (Mass.).

We further contend that one in possession of land, under a contract of purchase, is not an owner within the meaning of the mechanic's lien law, and the real owner is not estopped by the fact that work was done on the premises, when it does not appear that such owner knew who was doing the work or what claim would be made thereunder, and if a conveyance is made and a purchase money mortgage is taken back, then such mortgage will be prior to the mechanic's lien.

See *Courtmanche v. Blackstone*, 170 Mass. 50, 64 Am. St. Rep. 275.

We further contend that a vendor who sells land and reserves the title as security for purchase money, is not, from the fact that he knew of the purpose of the buyer to build on the property and the fact that the buyer is proceeding to accomplish such design, deemed in law to have consented to such building so as to make his title inferior to mechanic's liens.

The most that can be claimed for the appellants in this case is that Bron, at the time he went to work, had an indefinite parol agreement which had never been carried out, and that possession by Bron was not with the knowledge and consent of the appellees.

Referring to the case of *Reis v. Ludington*, 13 Wisc. 276, there is no distinction between a purchase money mortgage and a vendor's lien, where vendor's liens are permissible, and the same have preference over mechanic's liens.

We further contend that the statute in Kansas does not create any distinction between the ownership of a building and of the land, and the building follows the land and it cannot be separated, in the absence of a statute, by a judgment of the court.

We further contend that a mechanic acquires a lien from the commencement of a building only equal to that of a judgment upon the legal or the equitable title and is subject to the same rules. 32 N. J. Eq. 664, 11 L. R. A. 742, 39 L. R. A. (N. S.) 84.

The title to the land does not, for a single instant rest in the vendee, but passes from him and rests in the mortgagee.

Missouri Valley v. Reed, 45 Pac. 722.

Prior to the delivery of the instrument that created the title, no one has any rights to the land. When delivered, the parties' rights are fixed by the contract, as shown by the instruments. See

Gillespie v. Bradford, 27 Am. Dec. 494.
Reis v. Ludington, 80 Am. Dec. 741 (Wisc.).
Campbell's Appeal, 78 Am. Dec. 373.

In *Jones v. Osborn*, 108 Iowa, 409, a mortgage in the situation of The New Hampshire Savings Bank mortgage, in the case at bar, was held to have a prior lien. And to the same effect is the case of *Bartlett v. Bilger*, 61 N. W. 233.

In the case of *Thorp v. James, Inc.*, 41 N. E. 978, it was held:

> "Where a recorded mortgage stated that it was junior to another mortgage, not recorded, and the lien attached before the last one, the last mortgage and the mechanic's liens were junior to the first mortgage."

In the case of *Lumber Co. v. Schweiter*, 45 Kansas, 207, and *Getto v. Friend*, 46 Kansas, 24, the Supreme Court says:

> "If a vendee had entered with the knowledge and consent of the vendor, a different principle would be involved and govern in determining the rights of the parties. The vendee had no such title; the deed and mortgage were made at the same time; prior to title, there was not an instant of time that the vendee owned any title or right, and the title obtained thereafter cannot relate back, so as to affect the rights of the vendor."

To the same effect is *Smith v. Wilkins*, 64 Pac. 760 (Oregon), in which case it is said:

> "The deed and mortgage having been executed at the same time, there was no occasion for the mortgagee to post up notices to protect his rights."

In the case at bar, the instruments were delivered and recorded at the same time, and Bron, without the consent or knowledge of the owner, went on the lots clandestinely, with the intent, as found by the Referee (Transcript, page

10, figure 14) as a trespasser, with the avowed intention of destroying the vendor's rights and the rights of the holder of the $7500.00 mortgage.

In the case of *Toledo v. Hamilton*, 134 U. S. 299, it is said:

> "A recorded mortgage cannot be displaced by a contract and is prior to a mechanic's lien on a subsequent contract."

There is no difference between a recorded mortgage and a mortgage that is unrecorded, if parties are charged with the equities, as in the case at bar.

In the case of *Ettridge v. Bassett*, 136 Mass. 314, it is held:

> "Land was conveyed on August 20th, by deed dated August 13th. A mortgage was taken back in accordance with the agreement of August 13th. *Held:* The vendee could not subject the land to any lien for labor done prior to August 20th, unless done with the authority of the owner of the land."

In the case in 63 S. W. 306, a Texas case, it was held:

> "The fact that improvements were contemplated does not give a mechanic's lien holder prior right to a mortgage, where the improvement was not commenced until after the delivery of the instrument. The knowledge of the mortgagee that a mortgagor intended to build on the premises will not postpone his lien to a mechanic's lien."

See 27 Cyc. 326. To the same effect is—

Thorp v. James (Ind.), 41 N. E. 978.
Henry v. Hatton (Nebr.), 79 N. W. 616.
Allis-Chalmers Co. v. Central Trust Co., 111 C. C. A. 429.
Monks v. Provident Institution for Savings, 44 Atlantic, 966.
Chaffee v. Chested, 96 N. W. 161 (Nebr.).
Carriger v. Mackey, 44 N. E. 266 (Ind.).
Oatley v. Haviland, 46 Miss. 19.

On the same proposition that a mortgage may not be displaced by a subsequent lien, where the deeds and mortgages are part of one transaction, and that the registry laws of the State have nothing to do with it, see—

New Orleans & Ohio R. R. v. Mellen, Trustee, 12 Wallace, 362.
Jones v. Hancock, 1 Md. Chan. 187.
Steininger v. Raeman, 28 Mo. App. 564.
McKim v. Mason, 3 Md. Chan. 186.
Bernard v. Toplitz, 39 Am. St. Rep. 465.
Haxton Steam Heater Co. v. Gordon, 33 Am. St. Rep. 776.
Kilpatrick v. Kansas City, 41 Am. St. Rep. 758.
Harris v. Youngstown Bridge Co., 33 C. C. A. 75.

In this last case, it is said:

"A mortgage lien attaches to after-acquired property in the condition in which the mortgagor takes it, subject to all liens and equities valid against the vendee and mortgagor, which arise in the act of the purchase or acquisition of title thereto and qualify the scope and extent thereof."

In the same case, at page 79, it is said:

"A material-man, in the absence of a statute, who stipulates with the owner for liens upon improvements, with a right to remove them, only acquires such rights in subordination to the lien of a prior mortgage upon the land."

In the same connection, see—

Railroad v. Cowdry, 11 Wallace, 459.
Porter v. Steel, 127 U. S. 267.
Thompson v. Railroad, 132 U. S. 68.
Wade v. Railroad, 149 U. S. 327.

COMMON LAW PRINCIPLE.

A mechanic's lien is a creature of statute. It was not recognized at common law. There is no equitable principle applied, save and except in connection with equities raised by an act which the courts apply in the nature of an estoppel.

Nixon v. Lodge, 56Kansas, 304.
Vanstone v. Stillwell, 142 U. S. 346.
Lumber Co. v. Arnold, 88 Kansas, 471.
Lang v. Adams, 71 Kansas, 310, last paragraph on page.
Davidson v. Jennings, 83 Am. St. Rep. 49 (Calif.).
Wilcox v. Woodworth, 29 Am. St. Rep. 223 (Conn.).
National Fire Proof Co. v. Huntington, 129 Am. St. Rep. 228.
Conroy v. Perry, 26 Kansas, 472.

In the case of *Logan Planing Mill v. Aldrich*, 129 Am. St. Rep. 1038, it is held:

> "To enable a court of equity to enforce a mechanic's lien, it must have a legal validity. Equity follows the law."

Hedges v. Dickson, 150 U. S. 122.
Magniac v. Thompson, 15 Howard, 299.

As defined by the courts, there is no element of any estoppel against the appellees in the case at bar.

See—
Clark v. Coolidge, 8 Kansas, 189.
Rambo v. Bank, 88 Kansas, 258.

The case of *Lumber Co. v. Arnold*, 88 Kansas, 471, cited by appellants at page 12 in their brief, contains nothing which limits the appellees' rights, as in that case possession was delivered to the vendee, with knowledge and consent work was performed, and notwithstanding such delivery of possession, the court gave the vendor a first lien on the land.

And the same principle for which we contend was applied in the following cases:

Martsoff v. Barnwell, 15 Kansas, 612.
Huff v. Jolly, 41 Kansas, 537.
Lumber Co. v. Schweiter, 45 Kansas, 207.
Getto v. Friend, 46 Kansas, 24.
Conroy v. Perry, 26 Kansas, 475.

the execution of the mortgages. Appellants again select isolated phrases and sentences of the Referee's certifi and the District Court's opinion to establish this f Their position as to this is answered by the same contenti as made by the appellees under the first proposition of t brief.

If it could be said that appellants' position as to facts was correct, then the answer to this contention wou be that the transaction involved an executed contract a the statute of frauds does not control in such a situation,

It is well settled that the statute of frauds refers only executory contracts and in no way affects or relates to executed one.

James v. Manning, 79 Kansas, 830.
Randolph v. Wilhite, 78 Kansas, 355, at page 365.

CONCLUSION.

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals, in this case, set out in the transcript at pages 144 to 151, reviews all the facts in the case, construes the Kansas statute as to mechanic's liens, reviews the Kansas cases applicable to the facts, and reaches the conclusion that the contention of the appellees is well founded, as a matter of law, on the facts as established.

Appellees, therefore, submit that the judgment of the Circuit Court of Appeals should be affirmed.

SAMUEL C. EASTMAN,
Attorney for Appellees.

KOS HARRIS,
V. HARRIS,
R. L. HOLMES,
C. G. YANKEY,
W. E. HOLMES,
Of Counsel for Appellees.

ADDENDA.

In writing this brief there was accidentally omitted the case of *nd vs. Harrison*, 96 Kans. 542, 152 Pac. 655. This case be- a recent and important decision, we are making this addition this brief. In this case William H. Harrison, under a will his father, had the use as tenant at will of a quarter section land. A house on the property was partially destroyed by re. He rebuilt the house. The question was whether or not Materialmens' Lien could attach for lumber used in the con- ruction of the same, that is, did Harrison have sufficient in- est to support a lien, and also could the building be sold sep- ate from the real estate to satisfy the lien. It was held:

"No lie was adjudged against the land itself, or the interest of the trustee, and none could have been, since the statute requires the material to have been furnished under contract with the owner. His knowledge of its being furnished is not sufficient.

* * * *

"It is said that a mechanic's lien may attach to a building, apart from the building (27 Cyc. 226), although the decisions to that effect are for the most part based upon statutes materially different from ours. It attaches to a leasehold interest, and even where this is only that of a tenant at will the lien covers any building or improvement which the tenant would have right to remove. (*Hathaway v. Davis & Rankin*, 32 Kan. 693, 5 Pac. 29; *Lumber Co. v. Malone*, 8 Kan. App. 121, 54 Pac. 692; *Ombony v. Jones*, 19 N. Y. 234; *Boisot on Mechanics' Liens*, 295; *Phillips on Mechanics' Liens*, 3d ed., 191, 193).

The question whether the plaintiffs have a lien upon the building, or any part of it, depends upon whether a right of removal existed in the tenants." * * * *

* * * * "Under the facts found the whole of the reconstructed building must be regarded as a part of the realty, no part of which is owned by the tenant or subject to removal by him. We are constrained to hold that the mechanic's lien attaches neither to the land or its income, nor to the building, and since a sale of the leasehold of a tenant at will would be entirely barren of practical result, the plaintiffs are without remedy against the property." * * *